



REPUBLIC OF KENYA



**KENYA LAW**  
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**Anuko v Republic (Criminal Appeal 24 of 2020)  
[2023] KEHC 2238 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2238 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL 24 OF 2020  
KW KIARIE, J  
MARCH 20, 2023**

**BETWEEN**

**KENNEDY OTIENO ANUKO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal case NO.734 of 2019 of the Senior Principal Magistrate's Court at Oyugis by Hon. C.A. Okore-Principal Magistrate)*

**JUDGMENT**

1. Kennedy Otieno Anuko, the appellant herein, was convicted after pleading guilty to the offence of robbery with violence contrary to section 295 as read with section 296 (2) contrary of the [Penal Code](#).
2. The particulars of the offence are that on November 2, 2019 at Nyandhiwa village, Kamuma sub location in Rachuonyo South sub County within Homa Bay County, jointly with another, robbed Vitalis Vulimu Otieno of his mobile phone, universal charger, two packets of wheat flour and cash Kshs 1500.00 all valued at Kshs 6110.00 and immediately after the said robbery used actual violence against the said Vitalis Vulimu Otieno.
3. The appellant was sentenced to death. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
  - a) That the trial court erred in law and in fact in not explaining to the accused person all the ingredients of the charge of robbery with violence contrary to section 296(2) of the [Penal Code](#). Hence the appellant did not plead unequivocal to the charge.
  - b) That the appellant did not fully understand the offence with which he is charged since the court taking plea of guilty did not explain every element and ingredient constituting the offence in



a language that he understands and with that understanding and out of his own free will he admits the charge unequivocal.

- c) That the trial court erred in law in not explaining to the appellant the consequences of his plea of guilty and failed to record the same in its records.
  - d) That the trial court erred in law and in fact in not giving the appellant all the opportunity to dispute or explain the facts or to add any relevant facts before accepting his plea of guilty.
  - e) The trial court misdirected itself in not making a finding that this plea of guilty was not obtained voluntarily; it was obtained by force and deception from the complainant that the appellant will be forgiven by pleading guilty. Thus it cannot be said to be unequivocal. Hence it is in these circumstances a nullity.
4. The appeal was opposed by the state through Mr Ochengo. Learned counsel. His grounds were as follows:
- a) That the charge was read to the appellant in Dholuo;
  - b) That the facts were read; and
  - c) That the plea was unequivocal.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
6. Section 348 of the [Criminal Procedure Code](#) provides as follows:
- "No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."
7. Upon my perusal of the record, I find that the learned trial magistrate exercised abundant caution. The charge was read twice to the appellant on November 4, 2019. On both occasions he pleaded guilty to the charge. When the facts were read to him he stated:
- "The facts are correct that is how it happened."
8. After he was convicted and given a chance to mitigate this is what he told the court:
- "I am sorry for what I did. I will not do it again. I know that the charge is serious, it is robbery with violence. I am aware of that."
9. The charge was being translated into Dholuo, a language he indicated to the court that he understood.
10. I therefore find that the appellant understood the charge and that all the ingredients thereof were explained to him. His plea was unequivocal.
11. Section 348 of the [Criminal Procedure Code](#) provides as follows:
- "No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."



12. Was the appellant sentenced to a legal sentence? Section 295 of the *Penal Code* provides:

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

Section 296 (2) on the other hand provides:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

13. In *Joseph Njuguna Mwaura & 2 Others v Republic* [2013] eKLR, the Court of Appeal stated as follows:

"We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under Section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge."

14. The Court of Appeal in the case of *Paul Katana Njuguna v Republic* [2016] eKLR the test when an accused is convicted in a charge that is duplex such as is the case here, is whether any prejudice was suffered. The Court said:

"In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.

41. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."



15. In the instant case I find that the appellant understood the charge and all the essential ingredients thereof. He did not suffer any prejudice. The defect is curable under section 382 of the *Criminal Procedure Code*.

16. The upshot of the foregoing is that the appeal lacks merit. I accordingly dismiss it.

**DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

